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SUPREME COURT, U. S.

Supreme Court of the United States

October Term, 1973
No. 73-294

DONALD ZIMMERMAN,
Petitioner,

vs.

THE STATE OF OHIO,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT OF OHIO

BRIEF OF RESPONDENT IN OPPOSITION

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TABLE OF CONTENTS

Table of Authorities I
Statement of the Case 1
Respondent's Answer to the Petitioner's First Reason for Granting the Writ of Certiorari 3
Conclusion to the Petitioner's First Reason 6
Respondent's Answer to the Petitioner's Second Reason for Granting the Writ of Certiorari 7
Respondent's Answer to the Petitioner's Third Reason for Granting the Writ of Certiorari 9
Respondent's Objection to the Jurisdiction of the Court to Grant a Writ of Certiorari 10

TABLE OF AUTHORITIES

Cases Cited

Commonwealth v. Bordner, 247 A.2d 612 (Pa. 1968) 4
Commonwealth v. Frye, 252 A.2d 580 (Pa. 1969) 4
Cronan v. Mancusi, 444 F.2d 51 (2d Cir. 1971) *cert. den.*, 404 U.S. 1003 6
Jackson v. Denno, 378 U.S. 368 (1964) 6
Lamb v. United States, 414 F.2d 250 (1969) 4
Miranda v. Arizona, 384 U.S. 436 (1966) 4, 5, 6
People v. Gilbert, 154 N.W.2d 800 (Mich. 1967) 4
People v. Phinney, 239 N.E.2d 515 (N.Y. 1968) 4
State v. District Court, 432 P.2d 93 (Mont. 1967) 4
State v. Hoskins, 193 N.W.2d 802 (Minn. 1972) 4
State v. Kelter, 426 P.2d 500 (Wash. 1967) 4

State v. Lopez, 442 P.2d 594 (N.M. 1968) 4
State v. Mitchell, 163 N.W.2d 310 (Minn. 1968) 4
State v. Rudd, 230 A.2d 129 (N.J. 1967) 4
State v. Sandoval, 452 P.2d 350 (Idaho 1969) 4
State v. Zucconi, 235 A.2d 193 (N.J. 1967) 4
Tillery v. State, 238 A.2d 125 (Md. App. 1968) 4
United States v. Quinones-Gonzalez, 452 F.2d 964 (1971) 4

Constitution

Constitution of United States:

Article III 7
Fifth Amendment 3, 7, 8, 9
Fourteenth Amendment 3

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STATEMENT OF THE CASE

The Respondent basically agrees with Petitioner's Statement of the Case, with the exception of the narrative of facts surrounding the questioning of the Petitioner at the hospital shortly after the homicide of the victim.

From the Transcript it is apparent that the nurse's aide, Mrs. Kidd, asked the Defendant some questions that were not written out by Detective Wolfe. Mrs. Kidd volunteered to assist the police in asking the Defendant ques-

tions because the hospital also needed information (Transcript page 216). Detective Wolfe testified that he never asked or wrote out a question about the Defendant's wife (Transcript page 184).

Mrs. Kidd on the other hand, testified that she did question the Defendant about his wife. The following excerpt from the Transcript at page 217 indicates Mrs. Kidd initiated some of the questioning on her own and supports Officer Wolfe's testimony that his most direct question was "Who did this to you":

> Q. All right. Now, will you tell us as best you can recall what questions you then asked Mr. Zimmerman, and what if any responses you received.
>
> A. . . . And Detective asked him why—what—who did this to him, he said he did it. I asked him where was his wife, because I didn't know whether he knew—
>
> Q. What was that question you asked him?
>
> A. I asked him where was his wife.
>
> Q. All right. What did he say?
>
> A. He said his wife was dead.
>
> Q. All right.
>
> A. And I asked him how did he know his wife was dead, and he said, "Because I killed her."

Mrs. Kidd later responded to the Trial Court that Detective Wolfe did write out the question about the Defendant's wife (Transcript page 221) which is contra to the Officer's testimony. Mrs. Kidd's earlier testimony, however, indicates the question was initiated by Mrs. Kidd because of concern of whether the Petitioner knew what had happened to his wife.

RESPONDENT'S ANSWER TO PETITIONER'S FIRST REASON FOR GRANTING THE WRIT OF CERTIORARI

Is it a violation of the Fifth Amendment privilege against self-incrimination to admit into evidence a confession elicited without his knowledge from a murder suspect, who is lying semi-conscious in intense pain in an emergency room of a hospital preparatory to surgery, by a nurse's aide who asked questions written out by a police officer?

At the outset, the record does not affirmatively indicate that the incriminating statement by the Petitioner was in response to the question of a police officer or of a person acting at the direction of a police officer. This being the case, no State Action has been demonstrated. The exclusionary rule based on the Fifth Amendment is not applicable in the instant case because the Fourteenth Amendment can not be used as a bridge to the Bill of Rights absent State Action.

Even if this Court does find State Action, the exclusionary rule still does not apply to the instant fact situation. Before *Miranda* can even be considered it must be determined that the Defendant was in fact in custody by legal definition. Officer Wolfe was clearly well within the investigatory stage of his investigation, his conduct and questions indicating no accusatory implications concerning a party not even in police custody. Having information that a homicide had been committed and learning that another party lay on the verge of death in a hospital with a knife imbedded in his stomach, the officer would be in dereliction of his sworn law enforcement duty if he did not attempt to question a dying individual who

could quite possibly be the only individual who could supply information regarding this horrendous incident. Proper police investigation includes "inquiry of persons not under restraint" and not all interrogations require *Miranda* warnings. *Miranda v. Arizona*, 384 U.S. 436, 477 (1966).

Further, the fact that Petitioner was questioned at a hospital does not indicate an in-custody situation. Any authority offered by the Petitioner that being in a hospital constitutes being in-custody is clearly distinguished. Cases supplied by Petitioner indicate a hospital interrogation is in-custody when the questioned person is under arrest, or when gross coercion has been used, or when the questioned party is a prime suspect. In the instant case Officer Wolfe testified that his investigation had not focused on the Petitioner when the questions were asked at the hospital (Transcript pages 182-183).

A contemporary analysis of cases involving hospital interrogations indicate the Courts of various jurisdictions treat such questioning non-custodial, absent the party questioned being under arrest. See *United States v. Quinones-Gonzalez*, 452 F.2d 964 (1971); *Lamb v. United States*, 414 F.2d 250 (1969); *State v. Sandoval*, 452 P.2d 350 (Idaho 1969); *Tillery v. State*, 238 A.2d 125 (Md. App. 1968); *People v. Gilbert*, 154 N.W.2d 800 (Mich. 1967); *State v. Hoskins*, 193 N.W.2d 802 (Minn. 1972); *State v. Mitchell*, 163 N.W.2d 310 (Minn. 1968); *State v. District Court*, 432 P.2d 93 (Mont. 1967); *State v. Rudd*, 230 A.2d 129 (N.J. 1967); *State v. Zucconi*, 235 A.2d 193 (N.J. 1967); *State v. Lopez*, 442 P.2d 594 (N.M. 1968); *People v. Phinney*, 239 N.E.2d 515 (N.Y. 1968); *Commonwealth v. Bordner*, 247 A.2d 612 (Pa. 1968); *Commonwealth v. Frye*, 252 A.2d 580 (Pa. 1969); *State v. Kelter*, 426 P.2d 500 (Wash. 1967). These cases reason, pursuant to the *Miranda* guidelines

of this Court, that hospital inquiries are normal in routine and that the physical and psychological pressures inherent in police station interrogations are not present in the hospital interview. When *Miranda* is put in proper perspective, the decision was a protection against pressurized police interrogation tactics. *Miranda v. Arizona*, 384 U.S. 436 at 445-458 (1966). Not only were no pressurized tactics remotely present in the instant case, but, furthermore, there was not even a police officer asking the questions. There is absolutely no indication that the Petitioner was in any type of coercive atmosphere. On the contrary, everything possible was being done to comfort the interrogated party.

Thus, before *Miranda* prohibitions can be considered, there must be a determination of custody. The facts of the instant case demonstrate that the Petitioner was not in custody at the time of the questioning.

The Petitioner alleges his statement was obtained by trickery and deception. Officer Wolfe was investigating a possible double murder. The one victim still barely alive was the only person able to supply even a fragment of direct evidence. In these exigent circumstances, it is untenable to conclude that Officer Wolfe devised a sophisticated questioning technique to trick the Petitioner who appeared to be a victim and not a suspect. If that were the case, would Officer Wolfe stand beside Mrs. Kidd? On the contrary, Officer Wolfe was trying to obtain information as to what had happened to the Petitioner. The Transcript clearly indicates Officer Wolfe employed proper police investigatory procedures.

The Petitioner has made mention of the fact that pain and medication are salient considerations. These factors may determine voluntariness of a statement and

waiver of rights, but they have absolutely no nexus with custody. The Petitioner, not having been in custody, has not laid the prerequisite foundation for the application of *Miranda*, thus, precluding the voluntary-involuntary argument.

If, however, this Court does wish to explore the involuntary argument, the Respondent would offer *Cronan v. Mancusi*, 444 F.2d 51 (2d Cir. 1971), *cert. denied*, 404 U.S. 1003, where the Defendant, who was suffering from serious gunshot wounds, admitted, during questioning by police, that he killed his wife. The United States Court of Appeals, Second Circuit, held that his suffering from the gunshot wound did not give rise to a presumption that he was incapable of exercising free volition and making rational choices.

RESPONDENT'S CONCLUSION TO PETITIONER'S FIRST REASON FOR GRANTING THE WRIT OF CERTIORARI

The State maintains that a hospital employee asked the question that led Petitioner to incriminate himself, and, therefore, no State Action exists for the application of any exclusionary rule.

The State further contends that any statements made by Petitioner were not within the legal definition of custody and therefore the rule formulated in *Miranda* clearly does not apply.

Concerning Petitioner's contention that the rule in *Jackson v. Denno*, 378 U.S. 368 (1964), has been violated, the Respondent contends that this rule only applies to juries, and thus, is clearly distinguished from the instant case.

RESPONDENT'S ANSWER TO PETITIONER'S SECOND REASON FOR GRANTING THE WRIT OF CERTIORARI

Is it a violation of the Fifth Amendment privilege against self-incrimination to order a defendant who enters inconsistent, but legally permissible, pleas of "not guilty" and "not guilty by reason of insanity" to submit to a pre-trial psychiatric examination to determine his mental competency, i.e., sanity, at the time of and during the commission of the alleged crime?

The fact pattern in the case before this Court clearly precludes decision on Petitioner's proposition of law. The Defendant was ordered to submit to a pretrial psychiatric examination to determine sanity at the time of commission of the crime. The Defendant would only cooperate with Defense chosen doctors. The Defendant invoked his Fifth Amendment privilege when confronted with Court designated doctors. The Defendant, after remaining silent, was not ordered to cooperate. He made no statements and therefore no statements were even available for the State to attempt to use reference the examination. Even if the Defendant had made statements there is absolutely no indication the State would use such statements or that the Court would permit such statements into evidence. Therefore, the Petitioner has presented an issue that is not only moot, but as presented is not even justiciable, no Case or Controversy existing. U. S. Const. Art III. The Petitioner has merely presented a hypothetical situation speculating as to what might have occurred at trial if there had been an examination by State doctors.

Further, the Petitioner apparently had as his objective to make inconsistent pleas and then select at his convenience the benefits of each plea separately. By pleading not guilty by reason of insanity, and then precluding the State from examining the Defendant in total by virtue of the Fifth Amendment, the question of insanity has been effectively removed from the adversary arena. Not only does the Petitioner advocate this novel application of law, but also maintains the State cannot explain why it has not examined the Petitioner as ordered by the Court. To not allow the State to comment on the Petitioner's refusal to answer the questions of doctors to determine sanity would prevent any prosecution when the defense of insanity is raised.

The Petitioner has stated in his discussion of this Proposition of Law that this question has not been decided by this Court. This issue has not even been decided by the Ohio Courts. The first time Petitioner raised this issue was in the Ohio Supreme Court, and has, thus failed to preserve an appealable issue, and has instead tried to second guess what the Trial Court may have done.

RESPONDENT'S ANSWER TO PETITIONER'S THIRD REASON FOR GRANTING THE WRIT OF CERTIORARI

Is it a violation of Due Process to place upon the defendant the burden of proving the defense of insanity by a preponderance of the evidence when evidence of insanity has been introduced by the defendant and a doubt as to sanity created? Should not the rule, under Due Process, be that when intent is required as an element of a crime, the State must prove beyond a reasonable doubt the mental competency of the defendant to commit the crime for which he is charged?

In the first instance, the Petitioner has not offered any authority that remotely supports his contention.

Secondly, Petitioner's position during his trial would clearly prevent the State from prosecuting any case where criminal intent must be shown. The State could only prosecute the few minor crimes that are classified *mala prohibita* where *mens rea* does not have to be shown.

Even if this alleged due process rule were only applied when the sanity issue was raised (which would be in every criminal case if this were the rule), the simple mechanism of the Fifth Amendment would prevent a State examination of the Defendant and, thus, the State would be precluded from proving this additional element of sanity that Petitioner has created.

Further, this entire argument is not constitutional in nature but concerns Petitioner's dissatisfaction with sound Ohio procedure to allow a practical presentation of an insanity defense.

Therefore, the Petitioner, without supportive authority, is attempting to remove his burden of coming forward with evidence and establishing his burden of persuasion concerning an affirmative defense by presenting and speculating on an unworkable change in Ohio procedure.

RESPONDENT'S OBJECTION TO THE JURISDICTION OF THE COURT TO GRANT A WRIT OF CERTIORARI

In the first instance, the Petitioner has failed to demonstrate that a State Court has decided a question of substance. Further, the majority of Petitioner's argument is based on suggested changes in procedure, and speculations as to what may have occurred if Petitioner had submitted to psychiatric examinations by the State.

Therefore, the Petitioner having failed to demonstrate this Court's jurisdiction, and pursuant to the argument offered, the Respondent maintains Petitioner's Writ should be denied.

Respectfully submitted,

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